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BEFORE THE HOUSE RESOURCES COMMITTEE
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE & OCEANS

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ON BEHALF OF THE FOLLOWING ORGANIZATIONS:

AMERICAN CETACEAN SOCIETY
CETACEAN SOCIETY INTERNATIONAL
DEFENDERS OF WILDLIFE
EARTH ISLAND INSTITUTE
HUMANE SOCIETY OF THE UNITED STATES
INTERNATIONAL FUND FOR ANIMAL WELFARE
INTERNATIONAL WILDLIFE COALITION
MARINE MAMMAL CENTER
NATIONAL ENVIRONMENTAL TRUST
NATURAL RESOURCES DEFENSE COUNCIL
OCEANA
THE FUND FOR ANIMALS
THE OCEAN CONSERVANCY
WHALE AND DOLPHIN CONSERVATION SOCIETY

Good afternoon. My name is Andrew Wetzler, and I serve as senior project attorney for the Natural Resources Defense Council (NRDC). On behalf of our more than 500,000 members, I wish to thank you, Mr. Chairman, and the other members of this Subcommittee for inviting me to testify on today's panel.

NRDC's position on H.R. 4781, the 2002 Amendments to the Marine Mammal Protection Act (MMPA), is well represented in the testimony submitted today by The Ocean Conservancy. I will therefore confine the majority of my testimony to the proposal, initiated by the Defense Department (DoD), to amend the definition of "harassment" in the Act — a proposal that has generated profound concern throughout the conservation community. My testimony this afternoon is supported by a broad coalition of organizations deeply concerned about its consequences for marine mammals and the marine environment and for the MMPA itself.

I. BACKGROUND

NRDC has been closely engaged in many of the issues surrounding the Defense Department's proposal. We have been active participants in the environmental review of a number of DoD activities, including SURTASS LFA ("Low Frequency Active" sonar) and LWAD ("Littoral Warfare Advanced Development"). We have helped lead discussion about the impacts and regulation of ocean noise pollution—one of the major areas compromised by the DoD proposal—having published Sounding the Depths: Supertankers, Sonar and the Rise of Undersea Noise, a comprehensive look at the problem, in 1999. Over the last several months, we have been part of a coalition of national organizations opposed to a general Defense Department effort

to rollback the nation's environmental laws.

Two months ago, the proposed definition that is under discussion today was introduced by request into the House and Senate Armed Services Committees. It was introduced as part of a wider bill, called the Readiness and Range Preservation Initiative, which seeks exemptions for the Defense Department to six pieces of landmark environmental legislation: the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Clean Air Act, in addition to the Marine Mammal Protection Act. The approach taken by the Defense Department was to propose these exemptions, at the eleventh hour, for inclusion in the Defense Authorization Act for FY 2003. Both process and substance have been strongly criticized by nearly every national environmental NGO, by state Attorneys General, by community groups, and by the general public.

An MMPA provision was not contained in the defense bill that passed the House, nor was it added to the version of the bill that Senate Armed Services Committee passed onto the Senate floor.

From the beginning, NRDC and its many partners have been concerned about the consequences of the proposed language for the MMPA. In brief, the Marine Mammal Protection Act is our nation's leading instrument and an international model for the conservation of whales, dolphins, sea otters, seals, manatees, and other important and vulnerable species. The provision that the Defense Department would alter, the statutory definition of "harassment," is one of the cornerstones of the statute. By altering this definition, the Department would limit the circumstances under which activities that potentially harm marine mammals—that cause them physical injury, or that impair their ability to breed, nurse, feed, or migrate—could be reviewed. It would also make the definition vague and subjective, introducing a degree of ambiguity that could severely undermine the precautionary purpose of the Act.

II. ANALYSIS OF THE PROPOSED DEFINITION

The Marine Mammal Protection Act was adopted thirty years ago to ameliorate the consequences of human impacts on marine mammals. Its goal is to "protect and promote the growth of marine mammal populations commensurate with sound policies of resource management and to maintain the health and stability of the marine ecosystem." 16 U.S.C. § 1361(6). A precautionary approach to management was necessary given the vulnerable status of many of these populations (a substantial percentage of which remain on the endangered species list or are considered depleted) as well as the difficulty of measuring the impacts of human activities on marine mammals in the wild. "It seems elementary common sense," the Committee on Merchant Marines and Fisheries observed in sending the bill to the floor, "that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known." 1972 U.S. Code Cong. & Admin. News 4149.

Congress sought to achieve broad protection for marine mammals by establishing a moratorium on their importation and "take." The term "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13). Under the law, the wildlife agencies may grant exceptions to the take prohibitions, provided they determine, using the best available scientific evidence, that such take would have only a negligible impact on marine mammal populations or stocks.

There are two types of general exemptions available through the MMPA, "small take permits" and "incidental harassment authorizations." Both allow assessment of an activity's potential effects on marine mammals, both afford an opportunity for public comment, and both provide for the monitoring and

mitigation of biological impacts. Until 1994, the only exemptions available under the Act were "small take permits," which require the agencies to promulgate regulations specifying permissible methods of taking. In 1994, however, the MMPA was amended to provide a streamlined mechanism by which proponents such as the Defense Department may obtain rapid authorization for projects whose takings are by incidental harassment only. 16 U.S.C. § 1371(a)(5)(D). Under this provision, the responsible agency is required to publish notice in the Federal Register of any authorization request within 45 days of its receipt. Then, after a 30-day public comment period, the agency has 45 days to issue the authorization or deny it. By law, the entire process can run no longer than 120 days.

Within this scheme, the definition of "harassment" is a foundational element. It establishes the threshold for regulatory concern and describes the range of impacts (short of lethality) that the wildlife agencies must assess during the authorization process.

In 1994, Congress amended the MMPA to differentiate between two general types of harassment, a type that has the potential to cause physical injury and a type that has the potential to impact behavior of marine mammals in the wild. This definition reads as follows:

> The term "harassment" means any act of pursuit, torment, or annoyance which—
>
> (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or
>
> (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

16 U.S.C. § 1362(18)(A). The "potential to injure" is designated "Level A" harassment; the "potential to disturb" is designated "Level B" harassment. Both are considered "take" under the MMPA.

The Proposed Definition

The Defense Department claims that the current definition is overly broad and somewhat ambiguous. In an attempt to resolve this perceived problem, it has proposed the following language:

> For purposes of chapter 31 of title 16 of the United States Code, harassment from military readiness activities occurs only when those activities:
>
> (1) injure or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or
>
> (2) disturb or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavior patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behavioral patterns are abandoned or significantly altered; or
>
> (3) are directed toward a specific individual, group, or stock of marine mammals in the wild that is [sic] likely to disturb the specific individual, group, or stock of marine mammals by disrupting behavior, including, but not limited to migration, surfacing, nursing, breeding, feeding or sheltering.

The most salient effect of this language is to raise the threshold of regulatory concern. For Level A harassment, the proposed standard would shift from "has the potential to injure" to "injures or has the *significant* potential to injure." For Level B harassment, "potential to disturb" would become "disturbs or *is*

likely to disturb"; and an addition would be made to the language governing behavioral impacts, requiring that natural behaviors be "*abandoned or significantly altered*" to meet the threshold level of concern (emphasis added).[1]

What primarily concerns us, however, is the uncertainty that this new language would introduce into the Act.

First, regardless of what the Defense Department may claim, adding the term "significant" to the definition would not make it more "scientific"; on the contrary, it would take the Act into a scientific and policy arena that is beset by ambiguity. NMFS has already struggled for some years with this term and has yet to define it with regard to the "significant adverse impact" clause in the Act's "incidental take" provisions for commercial fishing (16 U.S.C. §§ 1383(g)(2), 1387(g)(4)). Currently, the state of marine mammal science will not yield a practical definition of "significant potential" or of "significantly altered"; indeed, these terms are likely to generate more scientific questions than answers.[2] (By contrast, the standard in the current definition refers to impacts—the disruption of behavioral patterns such as migration, breathing, and nursing—that are at least reasonably verifiable.)

Second, the same is true of the term "abandonment," the meaning of which may vary according to species, gender, time scale, and behavior. Even a temporary abandonment of a nursing bout between an endangered right whale mother and its calf is likely to have more serious consequences than the temporary abandonment of a swimming path by a gray whale—but it is unclear whether either event would count as "abandonment" under the DoD's analysis. In the past, the Department has discounted the significance of behavioral disruptions (such as disruptions in breeding behavior lasting several weeks) that are less than permanent in their effects.[3]

Third, the uncertainty produced by adding these ambiguous terms would only be exacerbated by the changes proposed in the standard of probability. In the current definition, the term "potential" is clear and requires no further evaluation of the probability of an activity to injure or disturb. By contrast, the DoD's proposal, in requiring that takes be "likely" or have the "significant potential" to occur, would demand a higher degree of proof than science is currently able to provide for many types of serious impacts, such as reduced calving rates. Furthermore, the emphasis on "significant potential" and "likelihood" would ignore the degree to which many impacts (such as strandings) may be context-dependent, varying by species, gender, behavior, time-scale, and location.

Taken all together, these changes would have a debilitating effect on enforcement. Under the terms of the Act, the DoD itself would have initial authority to decide whether its activities have the "significant potential to injure" marine mammals or are likely to "significantly alter" marine mammal behavior. A great many activities could simply evade the Act's requirements by relying upon the uncertainty and ambiguity in this new language and not seeking authorization in the first place. For the public or NMFS to enforce the Act in these circumstances would be difficult.

The practical outcome is that many more marine mammals would be impacted by military activities. Potentially injurious activities that were once assessed, monitored, and mitigated under the Act would no longer enter the permit process. NMFS could not ensure that their impacts on populations or stocks would be negligible, and the possibility that non-negligible impacts will occur would substantially increase. The benefits of mitigation and monitoring—which have been effective in protecting marine mammal populations while gathering critical information on biological impacts—would be lost under the proposed definition. Overall, the result is likely to be more injury and death of marine mammals, less mitigation and monitoring

of impacts, less transparency for the public and the regulatory agencies, and even more controversy and debate.

The language proposed by the Defense Department covers all activities related to "military readiness," an umbrella concept that would catch an extremely wide range of military and military-support activities whether or not they are actually performed by the DoD. But there is also a substantial danger that the proposed definition, once adopted, would be extended for the sake of consistency to other activities currently covered by the MMPA. The effect of such a move could be severe, compromising enforcement in similar ways for oil and gas production, power plant operations, and a wide range of other activities. Such a change would alter the underlying philosophy of the MMPA.

III. ASSESSMENT OF NEED FOR THE PROPOSED DEFINITION

Changing a core definition in a complex statute like the Marine Mammal Protection Act carries with it serious risks. The Defense Department, we believe, simply has not made the case that such a dramatic step is warranted.

Since 1994, when the current definition of "harassment" was adopted, the DoD has submitted approximately six applications for authorization under the Act's "small take" and approximately thirteen under its "incidental harassment" provisions. At least one application is currently pending; but of the rest—as Assistant Administrator William Hogarth noted before the House Armed Services Committee last March—the plain fact is that no application submitted by the DoD has ever been denied.

Moreover, provisions to accommodate Defense Department activities already exist within federal law. As noted above, the DoD may receive authorization to "harass" marine mammals through a streamlined process that, by statute, can run no longer than 120 days from the time of application. The agencies are allowed 45 days to publish notice of the application in the Federal Register, 30 days to solicit comments from the public, and another 45 days to accept or deny the application. By contrast, activities that the DoD typically submits for authorization are in development for many months or years. The DoD has not shown that an exemption process of the current length is burdensome, particularly in light of the Department's responsibilities under other environmental laws, such as the National Environmental Policy Act (NEPA), which are usually pursued concurrently.

Additional flexibility is available under the Armed Forces Code. Under the Code (10 U.S.C. § 2014), the DoD may seek special accommodation and relief from any agency decision that, in its determination, would have a "significant adverse effect on the military readiness of any of the armed forces or a critical component thereof." If the accommodations it seeks are not forthcoming, it may take its case directly to the President. These provisions have never been invoked with regard to the MMPA, presumably because the Department's requests for authorization under the Act have never been denied and because any mitigation required by the agency was adjudged not to have a significant adverse effect on readiness. (To our knowledge, the provision has not been invoked with regard to any of the other statutes that the Defense Department has recently sought exemptions from.) The Department has not shown that additional exemptions are necessary.

The DoD's Assessment of Need

The DoD has cited two cases in support of its position that changes to the harassment definition are needed: the SURTASS LFA case and the LWAD case. But these examples simply do not bear out the Department's claims, and we urge the subcommittee to give them both close inspection.

SURTASS LFA (short for "Surveillance Towed Array Sensor System Low Frequency Active" sonar) is a new technology that has raised extraordinary concern in the scientific community and the general public for its potential effects on marine mammals (so much so that, last fall, this subcommittee convened a panel to discuss the matter). The Navy began developing the LFA system in the early to mid-1980s; it began testing the system at sea in the late 1980s; it formally acquired the system for global deployment no later than 1991—and yet the Navy did not agree to prepare an Environmental Impact Statement under NEPA or fulfill its responsibilities under other statutes until 1996-97, after it had come under pressure from both the scientific and environmental communities. Contrary to what the Department has claimed (Readiness and Range Initiative Summary 3), only a small part of the delay it describes is directly attributable to the MMPA authorization process.[4] But whatever delay has occurred in this case is at least partly due to the Navy's decision, during the ten years it spent developing and testing LFA, never to apply for MMPA authorization.

The Littoral Warfare Advanced Development program (or "LWAD") is the second activity that the DoD claims has been compromised by the MMPA. Under the LWAD program, the Navy conducts tests of various systems and components used in antisubmarine warfare; nearly all of these tests have involved the use of intense active sonar (including one of the systems implicated in the unusual mass stranding of whales in the Bahamas) in coastal waters. By citing LWAD as it does, the Defense Department suggests that meeting the requirements of the MMPA has been burdensome. In fact, the Navy has not sought MMPA authorization for any of the seventeen exercises conducted under the program, despite the express recommendation of NMFS and despite numerous entreaties from the environmental community since March 2000, when the mass strandings occurred in the Bahamas. As the LWAD program has never gone through the authorization process, it is not evident what impacts the MMPA could have had in this case.

That the Defense Department has not demonstrated the need for major changes in the law is consistent with a current study, whose preliminary results were announced on May 7, 2002, by the General Accounting Office (GAO). The GAO's initial conclusions were that commanders throughout the Armed Forces continue to report a high level of combat readiness, and that the Defense Department has documented neither the training impacts nor the costs associated with meeting its stewardship responsibilities.

Rather than pursue broad legislative change, the need for which has not yet been demonstrated, the Department might look at non-legislative alternatives to further streamline the administrative process under MMPA and other laws. For example, Assistant Administrator Hogarth, in his March testimony, emphasized the value of taking a programmatic approach to environmental consultations. Such an approach would afford the DoD even more flexibility and would provide NMFS with adequate time to carry out its administrative responsibilities. To the extent this approach is adopted, Dr. Hogarth said, "the implications of the [MMPA] permit process should be minor."[5] NRDC and other groups have been making similar appeals to the Armed Forces for a number of years. To facilitate planning, for example, we proposed two years ago that the Navy work in collaboration with the National Marine Fisheries Service to identify areas of high biological productivity or significance and find acceptable seasonal or geographic alternatives. Non-legislative approaches may be available that both protect the environment and improve efficiency, and we would welcome the opportunity to work collaboratively to this end.

IV. CONCLUSION

In April, a broad coalition of national environmental organizations sent a letter to House members on the exemptions proposed the Defense Department. That letter included the following statement: "We firmly believe no government agency should be above the law – including the laws that protect the air and water in

and around our military facilities, the health of the people who live on bases and nearby, and America's wildlife and public lands. Eliminating environmental and public health protections would likely create more, rather than less, controversy for the Department of Defense."

NRDC supports the military's efforts to protect national security and is sensitive to the issue of military readiness. We do not believe, however, that the Defense Department has demonstrated that the dramatic changes proposed are necessary or that it has utilized the procedural remedies available to it under existing law. Adopting a substantially flawed change in the harassment definition would be disastrous for marine mammals and would severely diminish any chance of constructive dialogue on other conservation issues. NRDC, together with other groups, supports a process in which all stakeholders can work together to develop creative and collaborative solutions. We strongly urge that interest groups and the military are given the opportunity to work constructively on non-legislative alternatives before any fundamental changes are contemplated for a complex, important, and popular law.

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[1] The third subparagraph, which establishes a somewhat more conservative standard for behavioral impacts, would apply only to activities that intentionally "take" marine mammals, not to activities that take marine mammals incidental to their operation. ("Directed activities" is a term of art conventionally used to describe whale-watching trips, swim-with programs, and other interactive or observational engagement.) This provision would not cover any of the activities for which the DoD has sought small take permits or incidental harassment authorizations under the MMPA.

[2] In a 2000 report on the effects of ocean noise pollution on marine mammals, an ad hoc committee of the National Research Council (NRC) recommended changes in the MMPA's harassment definition that, while differing from the Defense Department's, included terms like "meaningful" and "significant." Unfortunately—as the same report concluded—our understanding of how marine mammals react to ocean noise is "rudimentary." To codify a standard like "significance" given this state of knowledge would create substantial uncertainty in the law and, as discussed below, would have regulatory consequences that the NRC committee, not having any legal experts on their panel, appears to have overlooked.

[3] See, e.g., Department of the Navy, Final Overseas Environmental Impact Statement and Environmental Impact Statement for Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar (Jan. 2001).

[4] That is, as opposed to the requirements set by other statutes. We recognize that the MMPA process has taken longer than usual in this case; one likely reason for this, however, is the extraordinary number of substantive comments that NMFS received from marine scientists during the public comment period, which we believe is appropriate for a controversial new technology that is slated for global deployment.

[5] Available at this time in transcript form from www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/02-03-14hogarth.html.